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POSITION PAPER ON GUARDIANSHIP CHANGES

GROW believes that the current Article 17-A family guardianship statute is the most effective abuse prevention legislation ever implemented and should be retained as a means of protecting the safety of people with developmental disabilities under a family approach.

We understand however, that there is currently a lawsuit in the SDNY to have Article 17-A declared unconstitutional as an alleged infringement upon the rights of people with developmental disabilities and that there are currently proposals, based upon OPWDD's Olmstead report, to amend 17-A, notably the current bill pending in the Assembly (**BILL NO A05840-2017, Sponsor: Lavine**) and in the last session an OPWDD program bill sponsored by Senator Ortt (S4983-2015). While we disagree that the current statute in any way infringes on the rights of people with developmental disabilities, we offer the following suggestions as to the legislation:

- In the case of any contested proceeding, the parent/petitioner should have the right to apply to the Surrogate for access to medical information relevant to determining the application.
- Existing guardianships and existing alternate and standby guardianships ordered under the current legislation should be **grandfathered** so as to not disturb the expectations of parents and families and possibly leave the ward without the protection that the families assumed was in place; that is, a new proceeding should not be required for succession unless the Surrogate determines in the individual case the necessity for it.
- Any role played by MHLS as counsel should be clarified and limited to the marshalling and reporting of evidence as to whether the individual lacks the functional capacity to make decisions; MHLS should not be in the position of itself making a determination of the individual's capacity as that is a medical question as to which the Surrogate should be permitted to consider the expert evidence.
- Any reporting requirement should be limited to guardianship property so as not to overburden already taxed family caregivers who struggle to comply with all of the other OPWDD imposed requirements with fee or compensation (see self-direction).

By way of background, as stated by former Nassau County Surrogate Judge Radigan:

> Article 17-A of the Surrogate's Court Procedure Act (SCPA), as currently enacted, permits the surrogate to appoint a guardian of the person or property, or both, for individuals with a developmental disability. In most cases, Article 17-A is used to ensure long-term guardianship of persons who never were and never will be able to care for themselves. It permits their parents, when the disabled persons become adults, to serve as their legal guardians while the parents live and appoint successors when the parents are gone. When it appears to the satisfaction of the court that a person is an individual with a developmental disability, the court is authorized to appoint a guardian if it is in the "best interest" of such a person. A mentally retarded person or an individual with an intellectual disability is a person incapable of managing their affairs or making decisions on their own behalf. An individual with a developmental disability is a person having an impaired ability to understand and appreciate the consequences of decisions on their own behalf, which results in such persons being incapable of managing their affairs.

We further agree with Judge Radigan's conclusion "Article 17-A remains flexible to be tailored to the individual under such a disability. The answer is not to modify or repeal such a beneficial statute, or otherwise incorporate SCPA 17-A into Article 81 because someone may attempt to use it inappropriately." (NYLJ, March 14, 2016).